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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1976

NO. 75-6907

BOBBY LEE BARKER, Petitioner

VS.

THE STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

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BOBBY LEE BARKER, Petitioner

VS.

THE STATE OF NORTH CAROLINA, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

_____

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of North Carolina filed on March 3, 1976 and certified on March 15, 1976 and as later affirmed by the Supreme Court of North Carolina in denying discretionary appeal, said judgment denying in this appeal filed on the 15th day of April, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals was rendered and filed on March 3, 1976 and reported as an unpublished opinion at 288 NC App. 729. A copy of this opinion is hereto attached and made a part of this Petition. The defendant appealed for discretionary review and said discretionary review was denied by the Supreme Court of North Carolina on April 15, 1976 and a copy of that judgment is hereto attached and made a part of this Petition.

JURISDICTION

The opinion of the Court of Appeals was rendered and filed on March 3, 1976 and bearing opinion number 7527SC827 and certified on March 15, 1976 and reported as an unpublished opinion at 288 NC App. 729. In due time a Petition for Discretionary Review to the Supreme Court of North Carolina was filed on March 17, 1976 and said Petition was denied by the Supreme Court of North Carolina on April 15, 1976. The Petition for a Writ of Certiorari to the Supreme Court of the United States was filed in said United States Supreme Court in apt time. This Court's jurisdiction is invoked under 28 U.S. Code Section 1257 (3).

QUESTIONS PRESENTED

Has the Petitioner been deprived of his constitutional right to due process of law under the 5th Amendment of the Constitution of the United

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States by the failure of the State's Courts of North Carolina to give retroactive application to the decision of the United States Supreme Court as found in Mullaney v. Wilbur, 421 U.S. 684?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The defendant Bobby Lee Barker was charged with the murder of his brother, D. L. Barker on the 16th day of August, 1974. A true bill was returned by the Grand Jury on the 30th day of September, 1974 and the defendant was placed on trial during the March 17, 1975 Regular Criminal Session of Superior Court in Gaston County, North Carolina with the Honorable Sam J. Ervin, III presiding.

The State elected to proceed only on the charge of 2nd Degree Murder to which the defendant entered a plea of not guilty. The evidence presented by the State showed a homicide of defendant's brother, and a knife being found near the body. The defendant's evidence tended to show that the deceased was coming at him with a knife after threatening him and that the defendant pulled a revolver to scare the deceased and that the gun went off. The defendant stated that he did not mean to kill the deceased but that he was simply acting in self-defense. At the close of all the evidence, the defendant movedfor a judgment of non-suit or dismissal which was overruled.

The Judge's Charge placed the burden on the defendant to satisfy the jury as to reducing the charge from 2nd Degree Murder to Manslaughter and to show that the killing was done in self-defense. The following charge of the Judge was given to the jury.

> "A" In order to reduce the crime to voluntary manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part; and in order to excuse his act altogether on the ground of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense. To

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negate malice and thereby reduce the crime to manslaughter the defendant must satisfy you of three things. First, that he shot D. L. Barker in the heat of passion. This does not mean mere anger. It means that the defendant's state of mind was at the time so violent as to overcome his reason so much that he could not think to the extent necessary to form a deliberate purpose and control his actions.

Second, that this passion was produced by acts of D. L. Barker which the law regards as adequate provocation. This may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition; and third, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

To excuse the killing entirely on the ground of self-defense, the defendant must satisfy you of four things. First that it appeared to the defendant and he believed it to be necessary to shoot D. L. Barker in order to save himself from death or great bodily harm. Second, that the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant as compared to that of D. L. Barker, the fierceness of the assault, if any, upon the defendant, whether or not D. L. Barker had a weapon in his possession, and the reputation, if any, of D. L. Barker for danger and violence.

Third, that the defendant was not the aggressor. If he voluntarily and without provocation entered the fight, he was the aggressor. One enters a fight voluntarily if he uses toward his opponent abusive language which considering all of the circumstances is calculated and intended to bring on a fight, and fourth, that the defendant did not use excessive force; that

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is, more force than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to him at the time. As you will recall, there is evidence in this case tending to show that D. L. Barker made certain threats against the defendant prior to this shooting. There is also evidence tending to show that the deceased, D. L. Barker, had a reputation of being a dangerous and violent fighting man. The Court will instruct you briefly as to the significance of this evidence in this case.

The Court instructs you that where self defense, is in issue, the deceased person's violent character is to be considered for two purposes. First, if it was known to the defendant, then it may be considered on the question of reasonable apprehension of death or bodily harm. Second, whether it was known to the defendant or not, it is to be considered on the question of which party was the actual aggressor since a man of violent character is more likely to have made the initial attack than is one who has a peaceable disposition.

So, in determining what the defendant's state of mind was and in determining who the aggressor was, you may consider the evidence as to the character of the deceased as being a dangerous and violent fighting man.

The Court further instructs you that with reference to the evidence of threats by the deceased against the defendant that threats of the deceased when communicated to a defendant may be considered upon the defendant's reasonable apprehension of death or serious bodily harm and that this evidence may also be considered as tending to show that the deceased was the aggressor, and that evidence may be considered by you in your deliberations and in arriving at your verdict.

If you find that the defendant acted property in self defense, he would be not guilty. This is to say if you find that the defendant acted in self defense, it would be your duty to return a verdict of not guilty. However, if the defendant though otherwise acting

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in self-defense used excessive force or was the aggressor though he had no murderous intent when he entered the fight, if he did, then the defendant would be guilty of voluntary manslaughter. "B"

The defendant by and through his attorney objected and excepted to the charge of the Judge in the record and that said case was then appealed to the Court of Appeals of North Carolina solely on the grounds that the charge improperly placed the burden of proof as to self-defense and as to mitigation on the defendant in violation of Mullaney v. Wilbur, 421 U.S. 684.

The Court of Appeals of North Carolina held that defendant Barker's case was controlled by the N.C. Supreme Court ruling of State v. Hankerson, 288 N.C. 632 in which the North Carolina Supreme Court held that Mullaney, supra was not retroactive. The Court of Appeals dismissed defendant's appeal in an Opinion filed on March 3, 1976 and certified on March 15, 1976. Defendant then petitioned for discretionary review to the North Carolina Supreme Court on March 17, 1976 and the North Carolina Supreme Court denied Motion for Discretionary Review and dismissed the appeal on April 15, 1976. The defendant then filed the Petition for Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The Opinion of the North Carolina Court of Appeals citing the case of States v. Hankerson, supra and as affirmed by the North Carolina Supreme Court, in dismissing the Petition for Discretionary Review has decided a federal question of the utmost importance to the administration of criminal justice in the United States that has not been previously decided by the United State Supreme Court. The question is whether or not the Supreme Court decision in Mullaney v. Wilbur, 421 U.S. 684 should be given retroactive application. It is respectfully contended that the decision of the North Carolina Supreme Court in Hankerson, supra rejecting retroactive application of Mullaney, is in error and that the Supreme Court of the United States should grant this Petition in order to decide for itself the question of Mullaney's retroactive application.

It has generally been held that the three factors or criteria for the retroactive application of any Supreme Court rule are: 1. The purpose to be served by the particular new rule; 2. The extent of reliance which have been placed upon the old rule; and 3. The effect on the administration of justice of the retroactive application of the new rule. The primary purpose of the rule of Mullaney was to re-affirm the substantial fundamental right of each defendant to have the State prove his guilt beyond a reasonable doubt as required

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rule dealing with the ultimate question of guilt or innocence.

Mullaney was not decided to impede a lawless action of police as cited in Linkletter v-. Walker, (1965) 381 U.S. 681 14 L. Ed. 2d 601, 85 S. Ct. 1731. Rather the purpose to be served by this particular new rule is to enhance the integrity of the fact finding process designed to decide the accused's fate, as found in Witherspoon v. Illinois, (1968) 391US510, 20 L.Ed. 2d 776, 88 S.CT. 1770, reh den 398 US 898, 21 L.Ed 2d 186, 89 S.CT. 67. Mullaney goes to the heart of the American system of criminal jurisprudence and is not simply a criminal procedure rule fostered to deter the police or to make a more streamlined administration of justice. It is specifically a decision which affects the final arbitration of guilt or innocence and sets the standard of the burden of proof as required under our law.

Secondly, there has been no reliance place on the old rule by any large numbers of states. As specifically stated in Mullaney, there are numerous states which do not follow the North Carolina or Main Rule and which in fact, require the state to negate self defense and to prove an illegal homicide. In fact, the United States Supreme Court as early as In Re Winship, 397 US. 358 decided that the application of the due process of law to the fact finding process required the state to prove every element of the crime beyond a reasonable doubt. And Winship was given retroactive effect in Ivan V. vs. City of New York, 407 US 203 (1972).

Thirdly, the effect on the administration of justice by giving retroactive application to the Mullaney rule would not be harsh in that this rule relates only to those homicide cases in which self-defense was a litigated issue. It is respectfully contended that the number of cases to be handled by the courts on re-hearings which would have been required by a general retroactive application as a constitutional rule, would be a relatively small number.

CONCLUSION

Defendant contends that the decision of the N.C. Court of Appeals in applying the N.C. Supreme Court decision of Hankerson in the instant case, was in error and that the U.S. Supreme Court should grant Certiorari to rightfully decide whether or not Mullaney should be given retroactive effect.

Respectfully Submitted.

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BOBBY LEE BARKER,
Petitioner

v.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief for Resp'd in Opposition

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

The Respondent, State of North Carolina, has adopted for its Argument here its "BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI" filed in this Court in the case of Johnnie B. Hankerson, Petitioner v. State of North Carolina, Respondent, No. 75-6568; the "TABLE OF AUTHORITIES" contained in said "Brief" is adopted and incorporated herein by reference. The sole additional authority cited in this Brief, which is not contained in the said "TABLE OF AUTHORITIES" is the opinion of the Supreme Court of North Carolina in the Hankerson case:

State v. Hankerson, 288 N.C. 632 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6907

BOBBY LEE BARKER, Petitioner

vs.

THE STATE OF NORTH CAROLINA, Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

From a verdict of guilty of voluntary manslaughter and judgment of imprisonment entered by the Superior Court on the 9th day of June, 1975, the defendant appealed to the North Carolina Court of Appeals. The opinion of the North Carolina Court of Appeals (Intermediate Appellate Court) affirming the judgment of the trial court is reported as an unpublished opinion at 28 N. C. App. 729. The defendant's appeal to the Supreme Court of North Carolina was dismissed, upon motion of the Attorney General of North Carolina, for lack of a substantial constitutional question. The judgment of the Supreme Court of North Carolina dismissing the appeal is reported at 289 N.C. 726.

JURISDICTION

The Jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

HAS THE PETITIONER BEEN DEPRIVED OR HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT (OR FOURTEENTH AMENDMENT) OF THE CONSTITUTION OF THE UNITED STATES BY THE FAILURE OF THE APPELLATE COURTS OF NORTH CAROLINA TO GIVE RETROACTIVE APPLICATION TO THE DECISION OF THE UNITED STATES SUPREME COURT AS ENUNCIATED IN MULLANEY V. WILBUR, 421 U.S. 684?

CONSTITUTIONAL PROVISIONS INVOLVED

Defendant relies on the Fifth Amendment to the Constitution of the United States reading as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Respondent believes that the Fourteenth Amendment to the Constitution of the United States is also involved:

"... No State shall ... deprive any person of life, liberty, or property, without due process of law ... "

STATEMENT OF FACTS

The defendant, Bobby Lee Barker, was tried at the March 17, 1975, Regular Criminal Session of Gaston County Superior Court by a jury. The defendant was charged under a bill of indictment with murder. The State elected to proceed only on a charge of second degree murder to which the defendant entered a plea of not guilty. The jury verdict was "guilty of voluntary manslaughter". On the 21st day of March, 1975, Prayer for Judgment was continued pending a pre-sentence investigation. Judgment providing that the defendant be imprisoned for a term of not less than eight years or more than twelve years was entered on the 9th day of June, 1975. From this judgment, defendant appealed to the North Carolina Court of Appeals.

The State's evidence was to the effect that the State's witness, Norris, and the deceased had been out to buy liquor with the State's witness driving; that when they returned to the home of the defendant and the deceased, about nine o'clock, the defendant approached the automobile in which they were riding; that the deceased told this witness to sit still; and that he, the deceased, had the car door open, one foot outside, and the glass rolled down; that the defendant said something, the only portion of which the witness understood were the words "I told you"; that the defendant then pulled a pistol and fired it right toward the head of the deceased. This witness testified on cross examination that he heard no threats and saw no knife until he saw a knife on the ground after the deceased had been moved. All of the evidence indicates that the defendant and the deceased had been drinking prior to the shooting. The State's witness, Reed, an investigating officer, testified that he saw no knife during his first search of the crime scene, but found a knife in the vicinity during a subsequent search, after the deceased had been moved.

The defendant acknowledged that he had shot the deceased but testified that he and the deceased had had words; that he was afraid of the deceased; that the deceased was getting out of the car with a knife in his hand; that he meant to shoot into the air to scare the deceased when the gun went off and

"I hit him". It was stipulated that a bullet wound was the cause of the death of the deceased.

It is thought that the charge of the trial judge to the jury, in its entirety, may be helpful to this court, and the same is hereinafter set forth exactly as it appears in the record on appeal in the North Carolina Court of Appeals:

JUDGE'S CHARGE

"Ladies and gentlemen, the defendant, Bobby Lee Barker, is being tried upon a Bill of Indictment in which he has been charged as follows: The jurors for the State upon their oath do present that Bobby Lee Barker, late of the County of Gaston, on the 16th day of August 1974 with force and arms at and in the said county feloniously, willfully, with premeditation and deliberation, and of his malice aforethought did kill and murder D. L. Barker contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

As you will recall, the State indicated at the outset that it would not place the defendant on trial for murder in the first degree but would seek a verdict of murder in the second degree or such other verdict as the evidence might warrant. The defendant has entered a plea of not guilty to this charge. The fact that he has been indicted is, as you have already been told, no evidence of his guilt. Under our system of justice, when a defendant pleads not guilty, he is not required to prove his innocence. On the contrary, he is presumed to be innocent; and the State must prove to you that he is guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

Now, one of my responsibilities is to give you a sufficient summary or recapitulation of the evidence to permit me to apply the law to the facts. I will not attempt to repeat all of the testimony that you have heard; but when you go to the jury room, it will be your responsibility to remember and to consider all of the evidence whether I may refer to it specifically or not.

As you will notice, I will use the mechanic of speech the evidence tends to show. I do this to indicate first that I have no opinion as to what the evidence in this case does or does not show; and second, I do it to constantly remind you that under our system of law it is the responsibility of the jury and the responsibility of the jury alone to determine what the evidence does or does not show and what the true facts about the matter are.

Now, in this case, the State of North Carolina has offered evidence tending to show and which the State contends does in fact show the following: That Cletus E. Norris had known both the defendant and the deceased for seven or eight years or longer; that on the 16th day of August of 1974, Mr. Norris went to Charlotte with D. L. Barker; that later during the evening, he received a call from D. L. Barker; and that D. L. Barker asked Mr. Norris to take him up the road a piece; that this call came about twenty minutes until nine; that he went to Mr. Barker's residence; that they went from there, with Mr. Norris driving, to an ABC store where D. L. Barker got a pint of liquor;

That D. L. Barker took two drinks on the way back to his home; that Mr. Norris pulled into D. L. Barker's mother's driveway at about five minutes until nine on the evening in question; that at that time, the defendant came out toward the car; that the car was stopped at that time; that the defendant was about fifteen feet from the car when Mr. Norris first saw him; that D. L. Barker at that time had the door open and had one foot outside; that he heard the defendant say something; that he heard him say the words, 'I told you'; that at that time, the defendant was right up at the car door; that the defendant pulled a pistol up there and pulled the trigger; that the pistol at that time was pointed right toward D. L. Barker's head; and that the defendant shot D. L. Barker; and Mr. Norris heard the gun go off; that the gun was about ten or twelve inches from D. L. Barker's head when it was fired; that the bullet his D. L. Barker over the right eye;

That D. L. Barker pitched out of the car on the side; that Norris then went to the Barker's mother's and called an ambulance; that at that time, D. L. Barker was still lying beside the car; that the defendant was standing there; that the defendant had a little .22 caliber revolver which Mr. Norris had seen before; and that the weapon introduced into evidence as State's Exhibit No. 1 was the gun that the defendant had on that occasion; that in Mr. Norris' opinion about thirty seconds elapsed from the time he entered the driveway until D. L. Barker was shot.

The parties further stipulated as you will recall and as I indicated to you, you can take these facts contained in the stipulation as having been agreed to and admitted by both sides for your purposes that Edward M. Kelman was a medical expert specializing in the field of pathology; that he performed an autopsy on the 18th of August of last year on the body of D. L. Barker; that if Dr. Kelman were present in court he would testify that D. L. Barker died as a result of a .22 caliber bullet wound to the head which caused hemorrhage; and that in his opinion D. L. Barker died as a result of this gunshot wound to the head; that he would further testify if he were here that he determined the blood alcohol level of D. L. Barker at the time of the autopsy and that D. L. Barker's blood alcohol content would be equivalent to a reading of .16 on the breathalyzer which under the law would indicate that he was under the influence of some intoxicating liquor at the time; that Johnny H. Reed was a member of the Gaston County Rural Police on the occasion in question; that in response to a call he went to the defendant's resident on Falls Street in South Gastonia; that the body of D. L. Barker was lying several feet away from the car, approximately five to six feet from it; that it was partially across an old fence;

That he observed a wound about the hairline on the left part of D. L. Barker's head; that he saw spots of blood on the door on the passenger's side of the car; that he made two searches of the crime scene; that at the time of the first search, he found nothing; and that he did not find during the first search a knife at the place where a knife was subsequently found.

Now, that, members of the jury, is what some of the evidence offered by the State in this case tends to show. What, if anything, it does in fact show is solely for you, the jury, to determine.

The defendant on the other hand has offered evidence tending to show and which he contends does in fact show the following: That the defendant, Bobby Lee Barker, was the brother of the deceased, D. L. Barker; that on the 16th day of August of last year, the defendant and D. L. Barker had been together from time to time during the day; that in the morning, D. L. Barker had asked his mother for

three hundred and fifty dollars so that he could have his teeth fixed; that Mrs. Barker told him that she did not have that much money; and that D. L. Barker said, 'Hell, you've got the money. I know you got your insurance money off the burned down house;' or words to that effect;

That later in the same day, D. L. Barker and his mother got into an argument; that D. L. Barker said, 'Goddamn it, I know you got the insurance money off the house;' that later on, the defendant told D. L. not to fuss at their mother like that; that the defendant then went outside and sat down; and that D. L. Barker came over where he was and sat with him; that he had a further conversation with him there; that the defendant told the deceased that 'you shouldn't fuss at mother'; that D. L. Barker said, 'Goddamn you, you don't believe I'll stomp your ass', or words to that effect; that at that time, D. L. Barker got up and left;

That the defendant stayed at the burned house for about two and a half hours until after it was dark; that he was scared of D. L. Barker; that later, he walked up to the front of the car and asked D. L. Barker where they were going; that D. L. Barker says, 'Goddamn you, I done told you;' that D. L. Barker opened the door and stepped out of the car; that D. L. Barker had the defendant's open knife in his right hand; that he got out of the car and was about three feet from the defendant; that the defendant tried to shoot in the air; and the gun went off and hit D. L. Barker; that he only meant to scare D. L. Barker; that D. L. Barker fell; that the defendant told Clet Norris to go and call an ambulance; and that the defendant went up to a Mr. Hawkins' house and asked him to call an ambulance or rescue squad;

That the defendant didn't mean to shoot D. L. Barker; that he meant to shoot in the air; and that he told Mr. Hawkins that D. L. Barker had a knife on him; and that he also told Mr. Hawkins that D. L. Barker tried to cut him; and that the defendant knew that D. L. Barker was going to cut him; that he knew D. L. Barker's reputation as a dangerous and violent man; that D. L. Barker was mean and would fight you at the drop of a hat; that D. L. Barker had had lots of fights and had whipped Bobby Black, Dock Wade, Sonny Hart, and others; that Marvin Barker was the brother of both the defendant and the deceased; that he knew his brother's general character and reputation for violence; and that whenever D. L. Barker drank liquor he was dangerous and violent; that Rodney G. Hawkins knew both the defendant and the deceased; that on the day in question, the defendant came to the front door of the Hawkins' house on the night of August 16th and rang the door bell; that the defendant told Mr. Hawkins that he had just shot D. L. in the head and asked him to come help him; that the defendant appeared to be frightened and scared; that later at the scene, he heard the defendant say that he's got a knife in his hand, and he also heard the defendant say that he wanted a police officer to see that D. L. had a knife. The defendant also said that D. L. had tried to cut the defendant.

R. T. Davis, Jr., that he was a detective with the Gaston Rural Police; that he saw the defendant at the police station; that the defendant stated in his presence at a time when he was not questioning the defendant that D. L. had opened the car door and had gotten out; that the defendant did shoot D. L.; but that he had to shoot him; that D. L. was going to cut him; that D. L. Barker pulled a knife on the defendant; that D. L. shouldn't have come on him with a knife; and that D. L. Barker brung it on his own self; that George M. Flowers was also with the Gaston Rural Police on the occasion in question; that when he arrived at the scene, he asked the defendant, 'Who did the shooting'; that the defendant said that he did;

That he took the gun out of the defendant's hand; that the defendant was with Mr. Flowers the entire time that Mr. Flowers was at the scene; that the defendant didn't go back to where the body was after Mr. Flowers arrived; and that the defendant mentioned the knife on the way to the police station.

By cross examination of Cletus Norris, that D. L. Barker had told him that D. L. and the defendant had been arguing but - and that they had been into a fuss but that D. L. Barker didn't say what the fuss was about; that D. L. Barker could have taken two or three drinks while he was in the car with Mr. Norris; that he later saw a knife at the scene; that the knife was open; and that he heard the defendant say that D. L. had a knife; that the knife he saw was where the body was;

That the defendant told Mr. Norris to go call an ambulance and that he also said, 'Please help me. I've shot my brother'; and that the defendant appeared to be tore up about it.

By cross examination of Johnny H. Reed, that the second crime scene search that he made, he found a knife; that it was lying about a foot from the car; that the car door was open when he arrived at the scene; and that the body was about four feet away from where the knife was; that the defendant to his knowledge was never in the area of where Sergeant Reed found the knife after Sergeant Reed arrived at the scene; that there were ten or more spectators in the area before the area was roped off.

Now, that, ladies and gentlemen, is what some of the evidence offered by the defendant tends to show. What, if anything it does in fact show is solely and entirely for you, the jury, to determine.

With reference to the law applicable to this case, the court will instruct you as follows: the defendant in this case has been accused of second degree murder. Under the law and the evidence in this case, it is your duty to return one of the following four verdicts; first, guilty of second-degree murder; second, guilty of voluntary manslaughter; third, guilty of involuntary manslaughter; or not guilty. I'll discuss these with you one by one at this time.

[The court charges you that in order for you to find the [defendant, Bobby Lee Barker, guilty of second-degree [murder, the State must prove two things beyond a reasonable [doubt. First, that the defendant intentionally and with-[out justification or excuse and with malice shot D. L. [Barker with a deadly weapon. Malice is not only hatred, [ill will, or spite as it is ordinarily understood, to [be sure that is malice; but it also means that condition [of mind which prompts a person to take the life of another [intentionally or to intentionally inflict a wound with a [deadly weapon upon another which proximately results in [his death without just cause, excuse, or justification.

[The court instructs you that a .22 caliber pistol of this [type introduced into evidence in this case as State's [Exhibit No. 1 is a deadly weapon.

[Second, the State must prove that the shooting was a [proximate cause of D. L. Barker's death. A proximate [cause is a real cause, a cause without which D. L. [Barker's death would not have occurred.

[If the State proves beyond a reasonable doubt that the [defendant intentionally killed D. L. Barker with a deadly [weapon or intentionally inflicted a wound upon D. L. [Barker with a dead[illegible] weapon that proximately caused D. L.

[Barker's death, then the law raises two presumptions. [First, that the killing was unlawful; and second, that [it was done with malice. Then, nothing else appearing, [the defendant would be guilty of second degree murder. [These presumptions, however, do not arise unless the [defendant intentionally killed D. L. Barker or intentionally [inflicted a wound upon D. L. Barker which proximately [caused his death.

['A' In order to reduce the crime to voluntary manslaughter, [the defendant must prove not beyond a reasonable doubt but [simply to your satisfaction that there was no malice on [his part; and in order to excuse his act altogether on [the ground of self-defense, the defendant must prove not [beyond a reasonable doubt but simply to your satisfaction [that he acted in self-defense. To negate malice and [thereby reduce the crime to manslaughter, the defendant [must satisfy you of three things. First, that he shot [D. L. Barker in the heat of passion. This does not mean [mere anger. It means that the defendant's state of mind [was at the time so violent as to overcome his reason so [much that he could not think to the extent necessary to [form a deliberate purpose and control his actions.

[Second, that this passion was produced by acts of D. L. [Barker which the law regards as adequate provocation. [This may consist of anything which has a natural tendency [to produce such passion in a person of average mind and [disposition; and third, that the shooting took place so [soon after the provocation that the passion of a person [of average mind and disposition would not have cooled.

[To excuse the killing entirely on the ground of self-[defense, the defendant must satisfy you of four things. [First, that it appeared to the defendant and he believed [it to be necessary to shoot D. L. Barker in order to save [himself from death or great bodily harm. Second, that [the circumstances as they appeared to the defendant at the [time were sufficient to create such a belief in the mind [of a person of ordinary firmness. It is for you jury to [determine the reasonableness of the defendant's belief [from the circumstances as they appeared to him at the [time. In making this determination, you should consider [the circumstances as you find them to have existed from [the evidence, including the size, age, and strength of [the defendant as compared to that of D. L. Barker, the [fierceness of the assault, if any, upon the defendant, [whether or not D. L. Barker had a weapon in his possession, [and the reputation, if any, of D. L. Barker for danger and [violence.

[Third, that the defendant was not the aggressor. If he [voluntarily and without provocation entered the fight, [he was the aggressor. One enters a fight voluntarily [if he uses toward his opponent abusive language which [considering all of the circumstances is calculated and [intended to bring on a fight; and fourth, that the defen-[dant did not use excessive force; that is, more force [than reasonably appeared to be necessary to the defendant [at the time. Again, it is for you, the jury, to determine [the reasonableness of the force used by the defendant [under all of the circumstances as they appeared to him [at the time.

[As you will recall, there is evidence in this case tending [to show that D. L. Barker made certain threats against [the defendant prior to this shooting. There is also [evidence tending to show that the deceased, D. L. Barker, [had a reputation of being a dangerous and violent fighting [man. The court will instruct you briefly as to the [significance of this evidence in this case.

[The court instructs you that where self defense is in [issue, the deceased person's violent character is to be

[considered for two purposes. First, if it was known to [the defendant, then it may be considered on the question [of his reasonable apprehension of death or bodily harm. [Second, whether it was known to the defendant or not, it [is to be considered on the question of which party was [the actual aggressor since a man of violent character is [more likely to have made the initial attack than is one [who has a peaceable disposition.

[So, in determining what the defendant's state of mind was [and in determining who the aggressor was, you may consider [the evidence as to the character of the deceased as being [a dangerous and violent fighting man.

[The court further instructs you that with reference to [the evidence of threats by the deceased against the defen- [dant that threats of the deceased when communicated to [a defendant may be considered upon the defendant's [reasonable apprehension of death or serious bodily harm [and that this evidence may also be considered as tending [to show that the deceased was the aggressor, and that [evidence may be considered by you in your deliberations [and in arriving at your verdict.

[If you find that the defendant acted properly in self [defense, he would be not guilty. That is to say if you [find that the defendant acted in self defense, it would [be your duty to return a verdict of not guilty. However, [if the defendant though otherwise acting in self defense [used excessive force or was the aggressor though he had [no murderous intent when he entered the fight, if he [did, then the defendant would be guilty of voluntary [manslaughter. 'B'

EXCEPTION NO. 2

[If you do not find the defendant guilty of second degree [murder or voluntary manslaughter, you would consider [whether he is guilty of involuntary manslaughter. In- [voluntary manslaughter is the unintentional killing of a [human being by an unlawful act not amounting to a felony [or by an act done in a criminally negligent way.

[In order for you to find the defendant guilty of involuntary [manslaughter, the State must prove two things beyond a [reasonable doubt. First, that the defendant acted un- [lawfully or that the defendant acted in a criminally [negligent way. The court instructs you that the defendant's [act would be unlawful if he pointed a loaded pistol at [D. L. Barker. Criminal negligence is more than mere care- [lessness. The defendant's act would be criminally negligent [if judging by reasonable foresight it was done with such [gross recklessness or carelessness as to amount to a [heedless indifference to the safety and rights of others; [and second, the State must prove that the unlawful or [criminally negligent act proximately caused D. L. Barker's [death. If D. L. Barker died by accident or misadventure; [that is, without wrongful purpose or criminal negligence [on the part of the defendant, the defendant would not be [guilty of any criminal offense. The burden of proving [accident is not on the defendant. His assertion of [accident is merely a denial that he has committed any [crime. The burden remains on the State to prove the [defendant's guilt beyond a reasonable doubt.

As I have already indicated, in arriving at your verdict, you may believe all that any witness has said, or you may believe part of what a witness has said, or you may believe none of what a witness has testified to. The credibility; that is, the worthiness of belief of the witnesses, is solely for you, the jury, to determine.

If your recollection of the evidence differs from my recollection or differs from the attorney's recollection, then you are to disregard what I say the evidence was, disregard what the attorneys say the evidence was, and rely entirely upon your own recollection.

Now, your verdict in this case must be unanimous. That is to say that all twelve of you must agree upon your verdict. I would suggest that when you go to the jury room that you select one of your number to serve as your foreman, to lead your discussions and deliberations, and then to announce your verdict when you return to open court.

[The court charges you that if you find from the evidence [and beyond a reasonable doubt that on or about August 16, [1974, Bobby Lee Barker intentionally and with malice and [without justification or excuse shot D. L. Barker with a [deadly weapon: to wit, a .22 caliber pistol, thereby [proximately causing D. L. Barker's death, nothing else [appearing, it would be your duty to return a verdict of [guilty of second degree murder. However, if the State [has not so satisfied you or if you do not so find or if [you have a reasonable doubt as to one or more of those [things, then you will not return a verdict of guilty of [second degree murder; but you would then consider whether [he is guilty of voluntary manslaughter.

[If you find from the evidence and beyond a reasonable [doubt that on or about August 16, 1974, Bobby Lee Barker [intentionally shot D. L. Barker with a deadly weapon; to [wit, a .22 caliber pistol, thereby proximately causing [D. L. Barker's death but you are satisfied that the [defendant killed without malice in the heat of sudden [passion, he being the aggressor but without murderous [intent in bringing on the dispute with D. L. Barker or [that he was using excessive force in exercising the right [of self defense, it would be your duty to return a verdict [of guilty of voluntary manslaughter.

[However, if the State has not so satisfied you or if you [do not so find or if you have a reasonable doubt as to [one or more of those things, then you will not return a [verdict of guilty of voluntary manslaughter; but you will [determine whether he is guilty of involuntary manslaughter.

[If, however, you are satisfied that under the circumstances [as they existed at the time of the killing that the defen- [dant, Bobby Lee Barker, reasonably believed it to be [necessary to shoot D. L. Barker in order to save himself [from death or great bodily harm and that Bobby Lee Barker [was not the aggressor and did not use excessive force, it [would be your duty to return a verdict of not guilty.

[As I have previously said, if you do not find the defen- [dant guilty of second degree murder or voluntary manslaughter [and you are not satisifed that the killing was excused by [self defense, then you must determine whether the defen- [dant is guilty of involuntary manslaughter. As to this, [if you find from the evidence and beyond a reasonable [doubt that on or about August 16, 1974, the defendant, [Bobby Lee Barker, pointed a loaded pistol at D. L. Barker [or that the defendant, Bobby Lee Barker, handled a loaded [pistol in a criminally negligent way by pointing it in the [direction of D. L. Barker and attempting to fire it into [the air thereby proximately causing D. L. Barker's death, [it would be your duty to return a verdict of guilty of in- [voluntary manslaughter.

[However, if you do not so find or if you have a reasonable [doubt as to one or more of those things, then it would be [your duty to return a verdict of not guilty.

[As I have previously indicated, if you find that this was [an accident or a homicide by misadventure, then it would [also be your duty to return a verdict of not guilty.

[As I stated at the outset, you may return one of four [verdicts. You may find the defendant guilty of murder in

[the second degree, you may find the defendant guilty of
[voluntary manslaughter, you may find the defendant guilty
[of involuntary manslaughter, or you may find the defendant
[not guilty. 'C' If you find that the defendant acted in
[self defense, you are to return a verdict of not guilty. 'D'

EXCEPTION NO. 3

[If you find that this was a homicide by accident or mis-
[adventure, you are to return a verdict of not guilty.

Let me direct this question to the original twelve jurors. If you feel that you are still mentally and physically able to continue to serve in this case until you have deliberated and arrived at your verdict, indicate that by raising your hand. Mr. Carter, do you feel like you are able to keep on working? Do you feel all right?

JUROR: Yes, sir.

All right, all of you, I take it, are ready and able and willing to continue to work as jurors until such time as you arrive at your verdict. Is that correct? If anybody feels bad or feels like you can't continue to serve until you complete your work, please raise your hand at this time. All right, it appearing to the court that all twelve of the original trial jurors are still able to function and to continue to work until a verdict is rendered, Mr. Bradshaw, the court will ask you to stand aside and be seated here in this chair for just a moment. Ladies and gentlemen, you may now retire to the jury room. As soon as you arrive at a unanimous verdict, knock on the door to indicate that you are ready to come back into court; and we'll bring you back in immediately.

You may now retire." (Emphasis and brackets supplied)

ARGUMENT

The sole question presented and discussed in the Petition pertains to failure of the appellate courts of North Carolina to give retroactive application to this Court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975). The Petitioner argues that North Carolina's failure to give retroactive effect to the constitutional doctrine enunciated in Mullaney is a denial of due process of law to the Petitioner.

This argument is squarely answered by the "BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI" filed in this Court on behalf of the State of North Carolina in the case of Johnnie B. Hankerson, Petitioner, v. The State of North Carolina, Respondent, No. 75-6568. The trial judge's instructions to the jury in this case are substantially identical to the instructions given in the Hankerson case as they pertain to the constitutional doctrine enunciated in Mullaney. Although the case at bar may be distinguishable from the Hankerson case in that here the jury verdict of "Guilty of voluntary manslaughter" would seem to remove from consideration the court's instructions concerning malice, the Respondent does not deem it necessary, at this point in time, to go further

in an attempt to distinguish self defense from malice as the Mullaney doctrine may be applicable to the court's instructions concerning each. Therefore, with the Exceptions hereinafter stated, the Respondent adopts and incorporates herein by reference Argument I(A)(1), (2), (3), and (4), Pages 13 through 28 of its aforementioned "Brief" in the Hankerson case, which speaks directly to the question of retroactivity.

The State of North Carolina's "Brief" in the Hankerson case, under the heading entitled "(2) The 'Purpose' Factor," beginning at Page 16 and continuing to the top of Page 19, following the words, "The record in this case shows the trial court instructed the jury in pertinent part, as follows:" contains excerpts of the charge to the jury in that case. These excerpts to the charge are stricken and the corresponding excerpts from the charge to the jury in the case at bar are substituted in lieu thereof. The entire charge is set forth in this Brief in the aforegoing STATEMENT OF FACTS, and the pertinent excerpts have been bracketed. The Court is referred to these bracketed portions in lieu of repeating the same here.

Although the opinion of the North Carolina Court of Appeals and the Petition deal only with the question of the general retroactivity of the constitutional doctrine enunciated in Mullaney v. Wilbur, supra, and although this case is distinguishable from the Hankerson case, primarily in that the jury found the defendant here guilty only of "voluntary manslaughter", thus rendering consideration of the Court's charge with respect to the burden of proof as to malice unnecessary, the State of North Carolina adopts and incorporates herein by reference, to the extent that it is applicable, the remainder of the argument in its "BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI" filed in the case of Johnnie B. Hankerson, Petitioner, v. State of North Carolina, Respondent (No. 75-6568), for such consideration as this court may deem necessary and proper to give it. Specifically, the portions of said "Brief" herein adopted begin on page 28 of said Brief, beginning with the subdivision heading entitled "(5) Limited Retroactivity", and continuing through the first full paragraph of page 37.

SUMMARY AND CONCLUSION

The position of the Respondent, State of North Carolina, is that the conclusion of its Supreme Court and its Court of Appeals in determining that Mullaney should not be given retroactive effect, were correct, and that, in so holding, they have not deprived the Petitioner, Bobby Lee Barker, of his constitutional right to due process of law.

Further, and if it is to be considered by the Court at this stage, the Respondent contends that the jury instructions in this case, viewed in light of the Mullaney doctrine, were not precluded by the opinion in that case, and did not constitute a denial of due process or any other constitutional right of the Respondent, the opinion of the Supreme Court of North Carolina in the case of State v. Hankerson, 288 N.C. 632 notwithstanding. It is submitted that substantial justice has been done in this case and, therefore, the jury verdict should not be disturbed.

Respectfully submitted, this the 10th day of September, 1976.

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